IN THE

Supreme Court of the United States

October Term, 1978.

No. 78-1232

DAVID I. COLLIER,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

STANFORD SHMUKLER,
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IN THE

Supreme Court of the United States

October Term, 1978.

No.

DAVID I. COLLIER,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

DAVID I. COLLIER, your Petitioner, respectfully prays that a Writ of Certiorari be issued to review the judgment of the Supreme Court of Pennsylvania, entered in the above entitled matter on November 9, 1978.

OPINIONS BELOW.

On November 9, 1978 the Supreme Court of Pennsylvania denied a Petition for Allowance for Appeal, in an unsigned *per curiam* order which has not been officially reported (App. A, *infra*, p. A1), thereby leaving in effect the unsigned *per curiam* order and judgment of the Superior Court, entered March 3, 1978, also not officially reported (App. B, *infra*, pp. A2-A3). This order affirmed the judgment of conviction and sentence imposed on December 28, 1976 by the Court of Common Pleas, Trial Division, Criminal Section, of Philadelphia County. The trial judge filed an opinion on February 23, 1977 in support of his denial of post-trial motions, which has never been officially reported (App. C, *infra*, pp. A4-A26).

JURISDICTION.

The order of the Supreme Court of Pennsylvania (App. A, *infra*, p. A1) denying the Petition for Allowance of Appeal, was entered on November 9, 1978. This Court's jurisdiction is invoked under 28 U. S. C. § 1257(3).

QUESTIONS PRESENTED.

1. Where trial counsel failed to object to the inclusion in a hypothetical question of damaging facts not in evidence, failed to object to the admission of damaging testimony of unrelated crimes not charged in the information, and failed to raise an obvious question as to the constitutionality of the statute under which Petitioner was charged, has not Petitioner been deprived of effective representation of counsel guaranteed by the Sixth and Fourteenth Amendments?

2. Assuming that the Pennsylvania appellate courts, rather than denying Petitioner's claim of ineffective assistance of counsel, refused to hear that claim because of the inarticulateness of the framing of the questions presented for review, does not the Pennsylvania rule which forever bars the raising of the issue of the ineffectiveness of trial counsel under these circumstances improperly deny Petitioner his rights to the assistance of counsel under the Sixth and Fourteenth Amendments?

CONSTITUTIONAL PROVISIONS, STATUTES AND FEDERAL RULE INVOLVED.

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; . . . and to have the Assistance of Counsel for his defence."

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> ". . . nor shall any state deprive any person of life, liberty or property without due process of law; . . ."

The Pennsylvania Drug, Device and Cosmetic Act of 1972, as amended, 35 P. S. § 780-1, *et seq.*, provides in pertinent part:

> § 780-113. Prohibited acts; penalties
>
> "(a) The following acts and the causing thereof within the Commonwealth are hereby prohibited:
>
> * * *
>
> "(14) The administration, dispensing, delivery, gift or prescription of any controlled substance by any practitioner or professional assistant under the practitioner's direction and supervision unless done (i) in good faith in the course of his professional practice; (ii) within the scope of the patient relationship; (iii) in accordance with treatment principles accepted by a responsible segment of the medical profession."

STATEMENT OF THE CASE.

This case is before the Court at a time when the need for competent performance in the courtroom has become a matter of deep concern to many members of the Bench, the Bar, and the law schools. They are coming to the realization that all the efforts of the past quarter of a century to improve the caliber of our judges will not provide justice in our courtrooms unless parties are represented by counsel qualified to protect their interests. This becomes particularly evident in the representation of defendants in criminal cases in which fundamental rights guaranteed by the Sixth Amendment and the Fourteenth Amendment are involved.

This case presents a dramatic example where counsel for a defendant clearly and indubitably failed to protect the defendant's interests in the most flagrant and harmful respects. Yet, the Pennsylvania Appellate Courts have permitted a guilty verdict to stand. This cannot be what the Sixth Amendment intended. It cannot be consistent with the goals of the forces now at work to improve the quality of representation in the courts of the country.

This Petition presents two important and interrelated questions concerning the right of a criminal defendant to effective assistance of counsel under the Sixth and Fourteenth Amendments. First, it raises the issue, the subject of much confusion among the circuits and states, of whether it is enough to establish ineffective assistance of counsel that the record contains serious reversible error material to establishing the guilt or innocence of the defendant which has been forever waived by the failure of counsel to make appropriate objections. Second it raises an issue of whether Pennsylvania improperly forecloses the enforcement of the federal constitutional right to assistance of counsel in a criminal case when it holds that the failure to raise the issue at the first possible opportunity forever

forecloses the issue of the effectiveness of trial counsel even though that failure is in no sense a knowing and intelligent waiver under federal constitutional standards but may, in fact, be the product of ineffective assistance of appellate or post-trial counsel.

Petitioner DAVID I. COLLIER, who was a licensed physician, was convicted in the Municipal Court of Philadelphia [1] on three complaints charging violation of the Pennsylvania Drug, Device and Cosmetic Act of 1972; [2] he was acquitted on a fourth.[3] He was placed on probation for three years and fined $2500. He thereupon exercised his right of appeal to the Court of Common Pleas of Philadelphia, Criminal Division, Trial Section, for a trial de novo, and was thereafter charged in eight informations with violation of the Drug, Device and Cosmetic Act on eight separate dates.[4] On September 13, 1976,

1. The Municipal Court of Philadelphia, created under the Schedule to the 1968 Pennsylvania Constitution, Judiciary Article, Article 5, § 16(r)(iii), and implemented by enabling legislation, 17 P. S. § 711.1 et seq., in 1969 and amended in 1971, and under rules promulgated by the Supreme Court, Pa. R. Crim. P. 6000 et seq., has jurisdiction over misdemeanors and felonies carrying a potential penalty of imprisonment not exceeding five years. The defendant in a Municipal Court case does not have a right to a jury trial but, if convicted has the right of appeal for trial de novo, including the right to trial by jury in the trial division of the Court of Common Pleas. This two-tier system is similar to that upheld by this Court in *Colten v. Kentucky,* 407 U. S. 104 (1972).

2. 35 P. S. § 780-1 et seq. is set forth in pertinent part, page 3, *supra.* Under § 780-113(b)(14)(2) the violation of § 780-113(a)(14) by dispensing a class III non-narcotic, such as involved in the case at bar, is designated a felony carrying a maximum term of five years and fine of $15,000.00.

3. He was convicted of dispensing or prescribing controlled substances on April 11, May 1 and May 13, 1975 and was acquitted of such conduct on June 6, 1975.

4. These eight informations charged dispensing or prescription of controlled substances not only on the three charges on which he appealed his Municipal Court conviction but on the fourth charge on which he had been acquitted, and on four additional dates

Petitioner waived his right to a jury trial and was thereupon tried on three of the eight informations.[5] Petitioner was found guilty on each of these charges, pre-trial motions were denied, sentence was imposed but was vacated to permit reconsideration of that sentence, and on December 28, 1976 the same sentence was reimposed—namely, imprisonment of not less than three months or more than twenty-three months in the county prison and a fine totalling $30,000. The remaining informations were then nol prossed.

A timely appeal was filed in the Superior Court of Pennsylvania. After the appeal was filed, on February 23, 1977, the trial judge filed an Opinion (App. C, *infra*, pp. A4-A26). The case was argued in the Superior Court on December 13, 1977 and on March 3, 1978 the Superior Court affirmed judgment in an opinionless per curiam order (App. B, *infra*, p. A3) (One judge did not participate in the consideration or decision of the case.)

Petitioner's counsel during pre-trial proceedings, trial, pre-verdict motions, sentencing and the filing of an appeal to the Superior Court, had been discharged after the appeal was filed. Thereafter, appellate counsel raised a number of issues in the appellate brief and during argument which had not been raised by trial counsel. Although appellate counsel did not specifically designate in the questions involved in that brief that he was charging ineffective assistance of counsel, he did note in those statements of questions that these issues had not been raised by trial counsel and, in the argument portion of the brief he specifically noted that the failure of trial counsel to raise those issues constituted ineffective assistance of counsel since the course chosen by trial counsel could have had no reasonable basis designed to effectuate Petitioner's interest. During oral argument at least one judge of the Superior Court suggested that the issue of ineffective assistance of counsel could not be raised unless specifically mentioned in the statement of questions involved. Thus, the Superior Court's opinionless order does not give guidance as to whether that Court had refused to consider the matters because improperly raised by trial counsel, because improperly raised by appellate counsel, or because, on the merits, it did not consider them to be a violation of petitioner's rights.

Appellate counsel thereupon prepared and filed in the Supreme Court of Pennsylvania a Petition for Allowance of Appeal in which he raised the ineffective assistance of counsel arguments. No brief in opposition was filed by the Commonwealth, which in lieu thereof filed copies of its brief in the Superior Court. By letter dated November 16, 1978, addressed to counsel, the Supreme Court advised that it had entered an order denying the Petition for Allowance on November 9, 1978. From this unsigned order it is impossible to determine the basis of the Supreme Court's order refusing to review the record.

4. (Cont'd.)
which had not been charged in the Municipal Court, namely, April 8, June 30, August 1 and June 16, 1975. It was improper for the Commonwealth to seek informations on these latter charges since trial on the one on which he had been acquitted constituted double jeopardy and trial on the others for which he had not been held violated the Pennsylvania Rules of Criminal Procedure and appropriate Pennsylvania law. Thus, the bills would have been quashed on Motion; however, trial counsel failed to object or move to quash those charges.

5. The Commonwealth apparently recognized its error and did not proceed to trial on these improper informations; however, it did introduce evidence at the trial which took place on some of the five days which were the subject of the other charges. Counsel failed to object to this evidence.

REASONS FOR GRANTING THE WRIT.

1. The Decisions of the Various Courts of Appeals and Highest Courts of the States Concerning the Standard to Be Used in Determining Whether a Defendant in a Criminal Case Has Been Denied the Effective Assistance of Counsel Guaranteed Him by the Sixth and Fourteenth Amendments Are So Confused and Contradictory as to Require This Court to Review This Case and Promulgate a Clear Interpretation of This Important Constitutional Guaranty.

The Pennsylvania courts have adopted a standard for determining whether representation by counsel measures up to the constitutional requirements of the Fourteenth Amendment, which incorporate the provisions of the Sixth Amendment. As enunciated in *Commonwealth ex rel. Washington v. Maroney*, 427 Pa. 599, 604, 235 A. 2d 349, 352 (1967), the standard applied by the Pennsylvania courts is:

> "(C)ounsel's assistance is deemed constitutionally effective once we are able to conclude that the principal course chosen had some reasonable basis designed to effectuate his client's interests." (Emphasis supplied.)

Also see *Commonwealth v. Nole*, 461 Pa. 314, 316 A. 2d 302 (1975); *Commonwealth v. Goosby*, 461 Pa. 229, 336 A. 2d 260 (1975); *Commonwealth v. Rice*, 456 Pa. 90, 318 A. 2d 705 (1974); *Commonwealth v. Harrison*, 228 Pa. Super. 42, 323 A. 2d 848 (1974). However, this standard differs from that established in other state and federal courts.

The Federal courts have articulated the Sixth Amendment requirements under a variety of phrases. The legal standard for ascertaining whether a defendant has been

denied the constitutionally guaranteed right to effective assistance of counsel is enunciated, in several Circuits, as an inquiry of whether counsel's representation is such as to shock the conscience of the court, and to make the trial a farce and mockery of justice. See *United States v. Bubar*, 567 F. 2d 192 (2nd Cir.) cert. denied, 434 U. S. 872 (1977); *Rickenbacker v. Warden*, 550 F. 2d 62, 65 (2d Cir. 1975); *United States v. Wright*, 573 F. 2d 681 (1st Cir.), cert. denied, 98 S. Ct. 2857 (1978); *United States v. Ramirez*, 535 F. 2d 125, 129 (1st Cir. 1976). The same standard, articulated somewhat differently by the Tenth Circuit, is whether counsel's representation is perfunctory, in bad faith, a sham, a pretense, or without adequate opportunity for conference or preparation. *United States v. Riebald*, 557 F. 2d 697 (10th Cir.) cert. denied, 434 U. S. 860 (1977); *Gillihan v. Rodriguez*, 551 F. 2d 1182, 1187 (10th Cir. 1977).

More than half of the Circuits, however, have expressly rejected this mockery of justice approach, some adopting a standard requiring counsel to be reasonably likely to render and rendering reasonably effective assistance. See *Gaines v. Hopper*, 575 F. 2d 1147 (5th Cir. 1978); *United States v. Fesell*, 531 F. 2d 1275, 1278 (5th Cir. 1976); *United States v. DeCoster*, 487 F. 2d 1197, 1202 (D. C. Cir. 1973); *Beasley v. United States*, 491 F. 2d 687 (6th Cir. 1974). In *Beasley*, the court stated that:

> "Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law. . . ." Id., at 696.

The Eighth Circuit articulation is whether counsel exercised the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances. *Pinnell v. Cauthron*, 540 F. 2d 938 (8th Cir.

1976); *United States v. Easter,* 539 F. 2d 663, 665-666 (8th Cir. 1976).

The impetus for making a shift from the "subjective" mockery of justice standard to a more objective standard came from *McMann v. Richardson,* 397 U. S. 759 (1970) where this Court, in determining the validity of guilty pleas entered on the advice of counsel who erroneously thought that their confessions would be admissible, stated that a defendant is entitled to legal assistance "within the range of competency demanded of attorneys in criminal cases".

Following the *McMann* shift of philosophy calling for a more stringent and objective standard for determining effective assistance of counsel, several Circuits have expressed their own formulae. The Fourth Circuit, in *Marzullo v. Maryland,* 561 F. 2d 540 (4th Cir. 1977), cert. denied, 56 L. ed. 2d 394 (1978), adopted the *McMann* test and commented:

> "A convict generally must establish that his counsel's error was so flagrant that a court can conclude that it resulted from negligence or ignorance rather than from informed, professional deliberation."

In the Third Circuit, the test for constitutional adequacy of legal services is whether counsel exercised the customary skill and knowledge which normally prevails at the time and place. *Boyer v. Patton,* 579 F. 2d 284 (3rd Cir. 1978); *Moore v. United States,* 432 F. 2d 730 (3rd Cir. 1970). In the Seventh Circuit, the standard is "assistance which meets a minimum standard of professional representation." *United States ex rel. William v. Toomey,* 510 F. 2d 635, 641 (7th Cir. 1975). The Ninth Circuit is internally divided. *Compare Saunders v. Eynans,* No. 75-3485 (9th Cir. April 18, 1977), with *Cooper v. Fitzharris,* 551 F. 2d 1162 (9th Cir. 1977).

This Court has failed to adopt or to approve any specific standard. The language of this Court in *McMann, supra,* in 1970, was not directed at a charge that counsel had been ineffective. On the contrary, the issue before the Court was whether and to what extent an otherwise valid guilty plea may be impeached in collateral proceedings by assertions or proof that the plea was motivated by a prior coerced confession. In discussing the factors that enter a defendant's decision to a plea of guilty, the Court noted that a plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession. The Court concluded that whether a plea of guilty is unintelligent and therefore vulnerable when motivated by a confession erroneously thought admissible in evidence depends initially, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases. It was in that context that the Court stated: "On the one hand, uncertainly is inherent in predicting Court decisions; but on the other hand defendants facing felony charges are entitled to the effective assistance of competent counsel."

Just this past term when the Court had an opportunity to resolve the issue of what minimum standard of competence must be displayed by an attorney for a criminal defendant in order to satisfy the Sixth Amendment's requirement of effective assistance of counsel, this Court denied certiorari, despite the vigorous dissent of Justices White and Rehnquist. *Maryland v. Marzullo,* 56 L. ed. 2d 364 (1978).

In the case at bar, this Court again has the opportunity of bringing order to the "disarray" left by the varying standards applied by the State Appellate Courts and

the Federal Courts of Appeals, some of which are mentioned by Justices White and Rehnquist.

2. Under the Standards for Determining Effective Assistance of Counsel Announced by the Majority of the Federal Courts of Appeals, Petitioner Is Entitled to a New Trial Because His Counsel Committed Serious Errors Allowing the Introduction of Inadmissible Evidence Likely to Have Led to the Incorrect Determination That He Was Guilty of Dispensing Prescription Drugs for Improper Rather Than Proper Purposes.

Here the conduct of Petitioner's trial counsel must be questioned in several respects. First, the trial counsel failed to object to a hypothetical question asked of a key prosecution witness which contained prejudicial material facts not in evidence and which failed to embrace all of the facts in evidence. The only direct evidence offered against Petitioner at the trial of this case was the testimony of an undercover police officer who called petitioner's office, gave false information to set up an appointment, perpetuated that false information on his first visit by pretending to be a former patient seeking pills to help in weight reduction. The officer testified to observations and discussions with the doctor on several visits thereafter. The Commonwealth also called Dr. Sidney Schnoll as an expert. He was asked a hypothetical question allegedly based on testimony in the case. However, that hypothetical question contained material facts which were not in evidence, and which were extremely damaging. One of the facts contained in the hypothetical question was a statement by the doctor asking the patient, "How can I keep giving you Preludin if you aren't losing any weight?" The patient allegedly responded, "Doc, you know I ain't trying to lose any weight." The Doctor thereafter wrote a prescription

for Preludin. No such testimony appeared in the record of this case. Not only were those facts not in evidence, but they were extremely prejudicial and damaging, going to the very heart of defense, which was based on the theory that the Petitioner was prescribing the substance in good faith as a doctor; he even took the stand and so testified. Yet the assumed facts in the hypothetical question show that the patient was not trying to lose weight and *that the doctor knew it* but continued to prescribe pills. These facts, if believed, would demolish the defense of good faith and bona fide doctor-patient relationship. Not only was this devastating to the defense, but it was apparently so considered by the trial Judge who was sitting without a jury and thus was the sole fact-finder. The trial Judge asked the expert witness a series of questions in which he specifically referred to that portion of the hypothetical question and asked whether under those circumstances the doctor was acting as a responsible member of the medical community. The witness answered that Petitioner should not have administered the prescription under those circumstances. The trial Judge in his opinion also specifically referred to the hypothetical question and concluded (erroneously) that the facts were ultimately found to exist by the Court and that the prescribed doses were excessive.

The hypothetical question not only embraced facts not in the record, it failed to embrace material facts in evidence and thus was improper under Pennsylvania law. *Murray v. Siegal*, 413 Pa. 23, 195 A. 2d 790 (1963); *Commonwealth v. Thomas*, 444 Pa. 436, 282 A. 2d 693 (1971); *Commonwealth v. Pilotsky*, 239 Pa. Super. 233, 362 A. 2d 253 (1976); *Commonwealth v. Greenberg*, 143 Pa. Super. 203, 17 A. 2d 698 (1941). Under the Pennsylvania formulation of the standard determining effective assistance of counsel, set forth in *Commonwealth ex rel. Washington v. Maroney, supra*, counsel's failure to object to this hypo-

thetical question could have no reasonable basis designed to effectuate his client's interest. Yet no objection was made or pursued at trial or on post trial Motions.

Second, trial counsel failed to move to quash the informations on the charges as to which he had been acquitted or had not been tried in the Municipal Court. Furthermore, even after the Commonwealth did not proceed to trial on those informations, counsel failed to object to evidence offered dealing with such incidents, even though this evidence related to crimes not charged against him. For example, the undercover police officer testified about an office visit on August 1, 1975 and about a prescription he received on that date; he also testified at great length about his visit and the circumstances leading up to his visit of April 8, 1975. In addition, the prosecutor even included considerable reference to the incidents surrounding the visit of April 8th and the assumed facts which were presented in the hypothetical question to Doctor Schnoll, and the Court, in its Opinion, devoted almost four pages to a review of the April 8th transactions, setting out the testimony almost verbatim. However, the informations dealing with the incidents on April 8 and August 1 were among those which defendant had not been tried on in the Municipal Court, and therefore had not been appealed, and accordingly should not have been the subject of informations. Furthermore, Pennsylvania law follows the general principle of criminal law that evidence of a distinct crime can not be produced against defendant who is being tried for another crime. *Commonwealth v. Bradley*, 243 Pa. Super. 208, 212, 364 A. 2d 944, 945 (1976), quoting *Commonwealth v. Burdell*, 380 Pa. 43, 47, 110 A. 2d 193, 195 (1975). In the case at bar, evidence of both of these transactions was not relevant to the alleged offenses which were properly before the Court and the evidence offered was highly prejudicial. Again, trial counsel's failure to object had no reasonable basis designed to effectuate his client's interests.

Third, the statute under which Petitioner was tried does not give a licensed practitioner such as Petitioner sufficient notice of the type of conduct which is prohibited, thereby rendering it unconstitutionally void for vagueness. Among other things, the statute makes it unlawful for the practitioner to dispense or prescribe the controlled substance unless it is done in accordance with treatment principles accepted by a responsible segment of the medical profession. 35 P. S. § 780-113(a)(14). Nowhere in the statute does it describe what treatment principles are accepted by a responsible segment of the medical profession. The statute fails to define responsible segment, and fails to indicate what treatment principles might be consistent with it. In fact, the phrase "responsible segment" is ambiguous and goes undefined. Who is to be considered responsible is entirely a subjective decision, and the statute does not even say who is to make that subjective decision. The number or percentage of practitioners necessary to constitute a segment is open to broad interpretation by unnamed persons. In fact, the Commonwealth's "expert" witness frankly admitted that he did not know what constituted a "responsible segment of the medical profession."

Likewise, the statute delegates to a private segment of the community, namely, medical practitioners, the right to designate conduct which is to be considered illegal. Furthermore, that vague and amorphous body of private individuals, not answerable to the public, can change those definitions at will. They could even discriminate against a segment of the public, or even a segment of their own membership, such as Osteopathic physicians, doctors who serve the poor, or others who are not in the inner circle. Accordingly, the statute unconstitutionally delegates to that unnamed group the power to define a crime.

Neither of these constitutional issues was specifically raised by trial counsel. His failure to raise these issues likewise fails to show some reasonable basis designed to effectuate the client's interests.

3. Only This Court Can Protect Petitioner's Sixth and Fourteenth Amendment Rights, Since Pennsylvania Improperly Holds That a Failure of Appellate Counsel to Raise the Issue of Ineffectiveness of Trial Counsel Constitutes a Waiver of the Right to Effective Assistance of Trial Counsel on the Part of That Defendant.

If the Pennsylvania appellate courts did, in fact, resolve against Petitioner his claim that he was denied the effective assistance of trial counsel, it seems clear that they resolved this claim improperly under the standards promulgated by this Court and that there is no way in which Petitioner can have the appropriate standards applied to him should this Court deny review. Equally important, the highest Court of Pennsylvania has developed a standard for determining the waiver of issues by a defendant, including issues involving substantial and important federal constitutional rights, which is totally out of keeping with the standards concerning waiver promulgated by this Court. As a result, if the Pennsylvania appellate courts chose not to resolve the question of the ineffectiveness of Petitioner's trial counsel because, in their opinion, the question was inarticulately posed by appellate counsel, Petitioner may, nevertheless, be barred forever from raising the issue of the effectiveness of his trial counsel.

To put the issue in its simplest terms. Assume that Petitioner's trial was rendered a complete mockery because of the failure of his trial counsel to object to inadmissible and highly prejudicial evidence. Assume, further, that new counsel was appointed on appeal and recognized the magnitude of trial counsel's errors. Accordingly, that appellate counsel raised the errors themselves on appeal, giving as the justification for failure to raise the same issues on post-trial motions as required by Pennsylvania law, the ineffectiveness of trial counsel. Assume, finally, that the Pennsylvania appellate courts concluded that the errors themselves could not be raised because of the failure to file post-trial motions and, at the same time, declined to consider the issue of ineffectiveness of trial counsel because that issue was posed only as a subsidiary part of the questions involving trial errors. Under a series of decisions by the highest court in Pennsylvania, Petitioner may now attack the effectiveness of his appellate counsel for failure to raise the issue of the effectiveness of his trial counsel in a private way. But, even if that issue is resolved in favor of Petitioner, Petitioner may still not raise the underlying issue of the effectiveness of his trial counsel; that issue may have been forever waived by the failure of "ineffective" appellate counsel to raise it on appeal.

Under Pennsylvania law, it is the duty of newly appointed or retained counsel to raise on appeal the ineffectiveness of predecessor trial counsel at the earliest stage of proceedings in which counsel whose effectiveness is being challenged no longer represents the defendant. *Commonwealth v. Hubbard,* 472 Pa. 259, 372 A. 2d 687 (1977); *Commonwealth v. Smallwood,* 456 Pa. 392, 350 A. 2d 822 (1976); *Commonwealth v. Carter,* 463 Pa. 310, 344 A. 2d 846 (1975); *Commonwealth v. Dancer,* 460 Pa. 95, 331 A. 2d 435 (1975).

In the case at bar, appellate counsel entered his appearance after post trial Motions had been denied, sentence had been imposed and the appeal had been filed and perfected. Thus, the first opportunity for new counsel to raise this issue was in the Superior Court. It was so raised in the Brief, although not designated in the statement of questions in terms of ineffective assistance of counsel.

Each of the three issues above set out was raised as trial error, and it was argued in the Brief that trial counsel's failure to object to or to raise the issues was not a waiver of those issues, but rendered his assistance ineffective. During Oral Argument, one Judge of the Superior Court refused to listen to the Argument because the issues had not been raised in the statement of questions, even though there is no rule or decision of law which imposes that obligation in Pennsylvania. The Superior Court's unsigned *per curiam order* (with one Judge not participating) does not disclose whether the Court considered the issue, or, if it did, what standard of effective assistance of counsel it applied. The Supreme Court's refusal to review the case, even though the issue had been squarely raised in the Petition for Allowance of Appeal in terms of ineffective assistance of counsel, fails to clarify the issue. Thus, Petitioner has been deprived of any ruling on the very serious questions of whether he has been deprived of his vital Sixth Amendment right to effective assistance of counsel in those three respects.

What is particularly important about this case, moreover, is that in Pennsylvania the question of ineffectiveness of trial counsel may have been foreclosed to Petitioner equally whether the courts ruled on the merits of the issue or whether they concluded that appellate counsel had failed to raise the issue in sufficiently clear terms to compel its decision. For, although Petitioner may raise under the Pennsylvania Post-Conviction Hearing Act the question of whether his counsel on appeal was effective in failing to raise with absolute clarity the issue of effectiveness of trial counsel—although it is difficult to see how this issue can be framed in view of the failure of the Pennsylvania appellate courts to announce whether they consider the issue to be properly raised—, it is clear under recent Pennsylvania Supreme Court decisions that the ultimate issue of relief based on the ineffectiveness of trial counsel may still

be foreclosed to Petitioner. Over strong dissents in *Commonwealth v. Hubbard*, 472 Pa. 259, 372 A. 2d 687 (1977), and equally strong concurrences in *Commonwealth v. Carter*, 463 Pa. 310, 344 A. 2d 846 (1975), the Pennsylvania Supreme Court has held that failure to raise the question of ineffective assistance of trial counsel on the first occasion that a defendant is represented by a lawyer other than his trial counsel constitutes a waiver of the right to raise that issue forever. Thus, although it is not possible to determine whether the Pennsylvania courts have decided the substantive question of whether Petitioner was deprived of his Sixth and Fourteenth Amendment rights to the assistance of counsel, it is clear that Pennsylvania's procedural rulings have had the effect of resolving that issue against Petitioner in any case.

Accordingly, only through the intervention of this Court, by reviewing this conviction, can there be guidance provided to the State and Federal Courts as to the proper standard to be applied in determining whether a person charged with crime has received effective assistance of counsel within the meaning of the Sixth Amendment, and can a miscarriage of justice be prevented in this case.

Anything less will mean that the efforts of the bench and bar, with Congress and the President, to improve the quality of justice by improving the quality of the judiciary will stop far short of assuring substantial justice. For unless the quality of counsel comes up to at least a reasonably adequate standard, the quality of the judges before whom cases are tried simply cannot assure that justice will not be done. And the efforts of this Court, the Judicial Conference of the United States, and the Devitt Committee, among others, to improve the quality of trial counsel cannot really achieve their ultimate goals, unless and until this Court announces, in clearest terms, the minimum

standards of performance which will be accepted from counsel, at least in Sixth and Fourteenth Amendment criminal cases. This is a most appropriate case in which to do this.

CONCLUSION.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted to determine whether the Pennsylvania Courts have ignored or improperly interpreted the Sixth Amendment requirements of effective assistance of counsel.

Respectfully submitted,

STANFORD SHMUKLER,
BERNARD G. SEGAL,
JAMES D. CRAWFORD,
Counsel for Petitioner.

Dated: February 7, 1979.

APPENDIX A.

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

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Cathe ne E. Lyden
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November 16, 1978

Stanford Shmukler, Esq.,
1314 Chestnut Street, 12th Floor
Phila., Pa. 19107

In re: Commonwealth of Pennsylvania
v. David I. Collier,
Petitioner.
No. 3484 Allocatur Docket

Dear Mr. Shmukler:

This is to advise you that the Supreme Court has entered the following Order on the Petition for Allowance of Appeal in the above captioned matter:

"Petition Denied this 9th day of November, 1978".

Very truly yours,

SALLY MRVOS
Sally Mrvos
Prothonotary

SM:mb
CC: Robert B. Lawler, Esq.

APPENDIX B.

SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 685, October Term, 1977

COMMONWEALTH OF PENNSYLVANIA

v.

DAVID I. COLLIER

Appellant.

Judgment.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of PHILADELPHIA County be, and the same is hereby AFFIRMED.

By THE COURT:

CHARLES A. HOENSTINE
Prothonotary

DATED: *March 3, 1978*

IN THE
SUPERIOR COURT OF PENNSYLVANIA

No. 685, October Term, 1977

No. 1734/1977
COMMONWEALTH OF PENNSYLVANIA

v.

DAVID I. COLLIER,

Appellant.

APPEAL FROM THE JUDGMENT OF SENTENCE OF THE COURT OF COMMON PLEAS, TRIAL DIVISION, CRIMINAL SECTION, OF PHILADELPHIA COUNTY, AT NOS. 947/949 MAY TERM, 1976.

Opinion.

(FILED MARCH 3, 1978)

PER CURIAM:

Judgment of sentence affirmed.

HOFFMAN, J., did not participate in the consideration or decision of this case.

APPENDIX C.

IN THE
COURT OF COMMON PLEAS OF
PHILADELPHIA COUNTY
CRIMINAL TRIAL DIVISION

MAY TERM, 1976

Nos. 947, 948, 949

COMMONWEALTH OF PENNSYLVANIA

v.

DAVID I. COLLIER

Opinion of the Court.

GOODHEART, *J.* FEBRUARY 23, 1977

I. PROCEDURAL HISTORY

Defendant David I. Collier, D.O., was arrested on January 29, 1976 on charges of unlawfully dispensing and prescribing, from his North Philadelphia medical office, controlled substances on specified dates in April and May of 1975. Following conviction in the Municipal Court, the defendant exercised his right of appeal to the Common Pleas Court for a trial de novo. Accordingly, Bills of Information Nos. 946, 947, 948, 949, 950, 951, 952, and 953 were returned on May 19, 1976 by the District Attorney's Office, charging the defendant with controlled substances violations on or about the following respective 1975 dates:

April 8, April 11, May 1, May 13, June 6, June 30, August 1, June 16.

On September 13, 1976, the defendant waived a jury and went to trial before Judge Bernard J. Goodheart. The Commonwealth proceeded on Bills Nos. 947, 948, and 949 only. The defendant was found guilty on each of these Bills, and on December 28, 1976, following denial of post-trial motions and a vacating for reconsideration of sentence of November 3, sentence was imposed as follows:

On Bill No. 947, imprisonment of not less than 3 nor more than 23 months in the County Prison and a fine of $10,000.00 to be paid during parole;

On Bill No. 948, two years probation with sentence consecutive to that imposed on Bill No. 947, and a fine of $10,000.00 to be paid during the period of probation;

On Bill No. 949, two years probation with sentence to run concurrent with that imposed on Bill No. 948, and a fine of $10,000.00 to be paid during the period of probation.

A nol prosse of the remaining Bills, Nos. 946, 950, 951, 952 and 953, was approved by the Court.

II. FINDINGS OF FACT

Officer Daniel Cassidy, Badge No. 9506, Philadelphia Police Narcotics Unit, was a highly credible witness; his testimony included the following transactions between the defendant and himself:

On April 8, 1975, pursuant to a Narcotics Unit assignment to investigate the illegal sale and dispensing of controlled substances at 3961 North 9th Street, Officer Cassidy made telephone contact with a person who identified himself as Dr. Collier, and whose voice Cassidy as a result of subsequent contact was able to identify as indeed that of the defendant. Dr. Collier asked Cassidy who he was,

what he (Collier) had treated him for and when was the last time he was there. Cassidy responded with the name James Robertson, not disclosing his true identity, stated that he was there the December before Christmas and that he had been given Preludin. Dr. Collier stated that he would be in his office and would wait for Cassidy for a half-hour. As a result of the conversation, Cassidy proceeded that day to the defendant's medical office at 3961 North 9th Street. Throughout his course of dealings with the defendant, Cassidy, working as an undercover officer, was wearing plain clothes and a moustache and long hair.

At the defendant's location on April 8, Cassidy observed three white males in the waiting room. One was called in by the defendant and left after two minutes. Shortly thereafter the remaining two men were called in. One of them entered the office and one remained at the doorway. Officer Cassidy related the following conversation between Dr. Collier and the two men:

> "Q. What did the doctor say to the white male?
> A. He said to the white male in the office, "Do you want the same thing?"
> The white male said, "Yes."
> The doctor then referred his conversation to the other male standing between the doorway: "How about you? What do you want? Do you want anything?"
> This male who was inside the room, he had first spoken to, said, "He's with me."
> Then he said, "You don't want anything?"
> Then there was conversation with the man between the doors, and he stated, "Yes, I want something."
> The doctor said, "Do you have money?"
> He said, "No, I ain't got no money."
> The doctor said, "You don't want anything." "
>
> N. T., Sept. 13, 1976, pp. 29-30

After the two men left, Cassidy was called in by the defendant. The following is the account of what next occurred:

> "A. I then entered the office and started into his office where the other white males had entered.
> He said, "No, come on in the back." At this time we proceeded down the hallway into the back office. When we got into the back office, he said, "What was your name and when were you here before?" I told him my name was Jimmy Robertson.
> Q. Why did you select that name?
> A. That was a prearranged name that I was to use for this investigation.
> Q. Please continue.
> A. He asked me my name. I told him my name was Jimmy Robertson.
> He said, "When were you here before?"
> I said, "It was in December, just before Christmas."
> He said at this time, "What did I give you then?"
> I said, "You gave me a script for Preludin."
> He said, "I can't give you any scripts today, but I can give you my own Preludin."
> Q. What did the doctor say, sir?
> A. He said, "I can't give you any script today."
> Q. What does script, sir, mean to you?
>
> . . .
>
> A. That is, sir, a street language for a term used for prescription blank given by a doctor.
> Q. Officer, after the doctor said that to you, what did you next say and what happened?
> A. He said to me that, "I can't give you them, but I can give you my own Preludin."
> I said, "That's cool. That will probably save me some money, right?"

He said, "Yes, you'll save some money."
At this time he said, "Take your jacket off. I have to weigh you."
I said, "Yo, Doc, do you have to put me this hassle? All I want to do is get that script."
Q. How were you dressed that day, if you remember?
A. I believe it was dungarees, sneakers, flannel shirt and an Army jacket.
Q. The doctor told you to take your jacket off?
A. Jacket off, that he had to weigh me.
Q. Please continue?
A. He then said, "Get on the scale and weigh yourself."
I got on the scale and I said, "Doc, I don't know how to work this thing."
He said, "I'll show you."
He then moved the weights around on the scale.
I got off the scale.
He then asked me my name, my address, my age, was I married, was I living at home.
Q. When he was asking these questions, was he writing it down anywhere? Do you know?
A. I believe he had a piece of copybook paper that he wrote my name down on.
Q. By copybook, what do you mean, sir?
A. Actual leaflet book used, bound book, used for, as children would use in school or college, et cetera.
Q. What type of answers did you give the defendant when he asked you those questions?
A. I told him my name was James Robertson, I was twenty-three, that I lived at 4012 Ludlow Street, that I was married and I wasn't living at home.
Q. Please continue.
A. At that time, he reached into a closet which he

used as a cabinet with numerous bottles and pills, et cetera, in there.
He reached in and pulled out a small glass vial with a white cap on it which he tore the label off of. Inside this bottle, I could observe capsules. They were brown on one side and clear on the other.
He said that they were the hundred gram.
I said, "They don't look like the other Preludin that you had given me."
He said they were the hundred milligram Preludin.
He then also reached in, took out a plastic bottle, a pill bottle, about yeah big, approximately eight inches high, took out white tablets out of this bottle and placed these in with the capsules, the brown and clear capsules that were in the small plastic bottle already.
He stated they were 35 milligram.
He stated, "I will give you enough for two weeks."
He asked me how often I wanted to come. I said, "Once or twice a week."
He said, "These are enough. These should last two weeks."
I said, "Come on Doc, you know these aren't going to last two weeks."
He said, "Why not?"
I said, "Because I share this with another guy."
Q. You said this to the doctor?
A. Yes sir.
Q. Please continue. Did you say anything else to the doctor?
A. He said, "You share these with another guy?"
I said, "Yes."
At this time he handed me a small clear bottle containing the tablets and capsules, and he said, "Pay the doctor fifteen dollars."

I gave him a twenty dollar bill, and he, in turn, gave me a five dollar bill in change. He said, "If you share these with another guy, would you want to double the amount?" "Do you have enough for another fifteen pills?"
I said, "How about if I come back on Friday and get the other amount?"
Q. Why did you say that to him?
A. At this time he said, "Do you have another fifteen dollars, and I said, "Well, I am sharing with this guy, and I want to get the money off of him."
He said, "If you want double the amount, give me those back and I'll give you double the amount."
He said, "Why don't you bring your friend here with you then?"
He asked me to come back on Friday.
He said, "Why don't you bring your friend with you Friday?"
I said, "How about, I'll come back on Friday and get here before"——
He said, "Get here before 10:00 in the morning because I have to go downtown."
At this time, I left the office. I took the vial of pills that he had given to me. They were taken back to the Narcotic Unit, 22nd and Hunting Park. I made a seizure analysis and property receipt, No. 573591, and then taken to the Police Chemical Lab for analysis. They were taken by myself."

N. T., Sept. 13, 1976, pp. 30-36

The brown and clear capsules, which Cassidy further testified numbered fourteen, were stipulated by the defense to have been phenmetrezine. N. T., Sept. 13, 1976, p. 135. The white tablets, also fourteen in number, were

acetaminophen, not a controlled substance. Cassidy testified also that on this date, April 8, 1975, the defendant saw him for a total of about five minutes, the defendant did not take his blood pressure, did not examine his eyes, ears or throat, did not use a stethoscope, did not take his pulse, and that the defendant had Cassidy weigh himself.

In accordance with Collier's instructions, Cassidy returned to the office on April 11, 1975, three days after his first visit. At this time Dr. Collier was unwilling to provide the drugs themselves, but was willing to provide a prescription, as follows:

"Q. What did the doctor say to you concerning these Schedule III narcotics?
A. He said they were Schedule III narcotics under the Federal Law and that doctors and pharmacists were being monitored.
He said, "If I gave you them, that wouldn't be practicing medicine, would it?"
To that, I didn't give any reply or answer.
At this time he said, "Weren't you in an accident?"
I said, "No."
He said, "Well, I can't give you Preludin."
He said, "If you were a big fat woman or something like that, I could get away with it, or if you had a broken arm or leg or bad back," he said, "I'm good at treating things like that.
Q. He said, "I'm good at treating things like that."
A. Yes, sir.
Q. What happened?
A. At this time, he took me from that office into the rear office where I had been on the first occasion. At this time, he said, "Get up on the scale and weigh yourself."
I jumped up on the scale. I jumped back off, never weighing myself.

At this time he said to me, "What did you want, Preludins?"
I said, "Yes, I want to get Preludins."
I told him I didn't like the other pills he had given me on Tuesday.
He said, "Well, you know, you have to eat with them."
He said, "They're good. I know. I've taken them myself."
He said, "Do you want to try something else?"
I said, "Well, anything as long as they're not the same thing you gave me on Tuesday."
At this time he said, "I'll give you a prescription for the Preludin, but they are going to be 50 milligrams."
He said, "They're not going to be the ones you want."
I said, "That's okay."
He said, "Will you take this prescription blank?"
I took a blue prescription blank. At this time he wrote my name and address on it, which he had asked me and I had given to him, and he said, "You pay the doctor fifteen dollars."
He said, "You take this prescription blank around to the pharmacy at 8th and Luzerne," he said, "Right around the corner here," he said, "And they'll fill it for you."

* * *

Q. Now sir, how much money did you give the defendant on that particular date?
A. Fifteen dollars.
Q. Now, after you gave the money to the defendant, what else happened?
A. After he told me to take it around to the drugstore to have it filled, he said, "Do you want anything?"

He said, "These are uppers."
He said, "These are going to keep you awake."
I said, "That's cool."
He said, "Well, do you want anything for nausea or anything like that?"
I said, "No, I don't want anything else."
I said, "Can't you put this on the D. P. A. card so it wouldn't cost me as much money?"
He said, "No, not on the card."
He said, "Maybe next time when you come," he said, "but if you want these, you have to pay for them."
It was later that afternoon that I took the prescription blank around to the pharmacy to be filled."

N. T., Sept. 13, 1976, pp. 46-49

A xeroxed copy of the prescription of April 11 was made by Officer Cassidy, and at trial accepted into evidence (Exhibit C-2). This prescription was for thirty Preludins, dosage 50 milligrams.

No examination of Officer Cassidy took place on this date either. The entire transaction lasted seven or eight minutes.

On May 1, 1975, Officer Cassidy returned to Dr. Collier's office and again was able to obtain prescriptions from the defendant, for both Preludin and glutethimide. The exchange was testified to by Officer Cassidy as follows:

"Q. Please describe what happened once you entered the office?
A. He said, "You want Preludin?"
I said, "Yes."
I believe he said something to the effect that, I can't give you a script for it," or something.

I said, "Can't you put it on one of them D. P. A. forms where I don't have to pay for it? It wouldn't cost me as much money all the time."
He said, "I can't." He said, "D. P. A. won't pay for it."
I said, "Are you sure?"
He said, "I'll give you all the money I have if they do. I'm telling you, they don't."
He said, "Come on in the back here."
He said, "How much did you pay for them before?"
I said, "Well, it cost me fifteen dollars to you for the script and another fourteen or fifteen dollars at the drugstore to get them filled."
He said, "You only paid me fifteen, not twenty?"
I said, "Only fifteen."
He said, "Okay. Anyway," he said, "I wish you'd get here during hours. I hate putting up with you people."
Q. The defendant said that?
A. Yes, sir.
Q. How were you dressed that day?
A. Plainclothes. I don't remember exactly what it was.
Q. What was your facial appearance, sir, on that date?
A. I believe I might have been growing a beard at that time, sir. I'm not exactly sure.
Q. What was the length of your hair, sir?
A. It might have been a little shorter than it is now.

* * *

Q. What happened next?
A. We then walked into the rear office. It was at this time I observed the female patient in his office.

We proceeded into the back office. At this time he started looking through some files.
I said, "Doc, I don't think you ever made a chart up on me." I said, "You looked there all the time."
He said, "Do you have your card?"
I said, "Yes, I do."
At this time, I produced a Medical Assistance Card.
Q. In whose name was this Medical Assistance Card?
A. James W. Robertson, 4012 Ludlow Street.
Q. Please continue.
A. He took this card. At this time he gave me a standard medical invoice which is a Pennsylvania State form. I believe it's Pa-259. He told me—he instructed me to sign in two places, my name, and write my address in one, and also at that time he furnished me with a prescription blank pad, blue in color, similar to the one I identified earlier. He said to write my name and address on that.
Q. Did you do that, sir?
A. I did. I wrote on there, James W. Robertson, 4012 Ludlow Street.
At this time he left the office where I was and proceeded into the front area where the other person was. He was gone approximately two or three minutes when he returned. At this time he took the prescription blank and filled it out. I said, well, Doc, can't you give me something else?"
He said, "Pay the doctor fifteen dollars." I had paid him fifteen dollars in U. S. currency.
I then asked him, "Can't you give me something with the D. P. A. so I don't have to pay for it, something I can get on the card?"
He said, "Well, like what?"
I said, "I don't know. Those white pills. They got some kind of numbers on them."

I said, "I think they're Doridens."
Q. You said this to the doctor. Is that right?
A. Yes, sir, I did.
Q. Please continue?
A. At this time he wrote out another prescription. He wrote this one out. He then reached into a drawer in a white cabinet. He took out a stamp and stamped on this prescription, I believe it was, Glutethimide, 0.5 grams.
He then handed me the both prescription blanks, and the one he was holding in his hand was the one for Preludin.
He said, "If the pharmacist asks you if you paid for this, you tell him, no."
He said, "If anybody asks you if you paid for this, you tell them, no."
I said, "Okay. That's cool."
I then left the doctor's office and returned to Narcotic Headquarters, xeroxed both prescription blanks, and later that day I returned to Luzerne Pharmacy at 8th and Luzerne, to have them filled.
Q. Before you get to the pharmacy, did you pay the doctor for this particular visit?
A. Yes, sir, I did.
Q. How much did you pay the doctor for this visit?
A. Fifteen dollars."

N. T., Sept. 13, 1976, pp. 62-67

The prescription for the Preludin was for 30 tablets of 75 milligram strength. The prescription for the glutethimide was for 7 tablets of 500 milligram strength. (Exhibits C-4 and C-5 respectively).

Officer Cassidy went yet again to the defendant's office location on May 13, 1975, and again obtained a prescription for Prelulin, as follows:

[Cassidy] "I was called into the office and directed to the rear where the doctor was presently standing in the rear office. At this time he said, "What do you want?"
I told him I wanted to get a script for Preludin.

BY THE COURT:

Q. For what?
A. Preludin.
He said, "You want Preludin, right?"
I said, "Yes."
He said, "Okay, get up on the scale and weigh yourself." Excuse me. The nurse said that to me. The nurse said, "Get up on the scale and weigh yourself."
I got up on the scale. I got off the scale. I think I said 210.
Prior to getting on the scale, I said, "Doc, I'm only here to get a couple scripts. Why do I have to go through this hassle?"

BY MR. WILBRAHAM:

Q. You said that to the defendant?
A. Yes. He said, "Get up and weigh yourself." I got back on the scale and I said, "210."
Q. What next happened, sir?
A. At which time he was starting to write out the prescription blank. He had pulled a yellow file from the files on the opposite side of the room, a yellow folder, a binder type folder. On it was the name Robertson, James.

MR. WILBRAHAM: Your Honor, I would request that this be marked Commonwealth's Exhibit C-6.

THE COURT: It will be so marked.

BY MR. WILBRAHAM:

Q. Now, sir, I show you what has been marked Commonwealth Exhibit C-6. Can you identify that item?
A. Yes, sir. This is the yellow folder with the name James Robertson on it that I observed the doctor pull from amongst other files.
Q. After he pulled this file, what if anything happened, sir?
A. He opened it up, and I observed one piece of paper. The copybook paper was in there.
Q. Sir, I want you to open up what has been marked Commonwealth Exhibit C-6. Sir, what is contained in C-6?
A. One piece of copybook paper. One piece of paper tablet, SKF. It is some type of drug commerical, is on it.
Q. Sir, if you know, have you ever seen that piece or had you ever seen that piece of copybook paper prior to this particular date, May 13, 1975?
A. Yes, sir, I did, on a prior occasion inside the doctor's office.
Q. And have you referred to that earlier in your testimony, sir?
A. Yes, I believe I have.
Q. Now, sir, what happened once the defendant retrieved this folder or got this folder? What happened then?
A. He then started to write out a prescription blank for Preludin.
At this time I asked him if he could give me six. He said, why did I want six.
I said, I was getting rid of it pretty good, and this way I won't have to keep coming up and get them, and I could cash them in other drugstores.

He said, "No, I can't. There's a commission watching doctors and pharmacists."
He said, "I couldn't do it."
I said, "Well, don't worry about it. I have the money."
At that time I showed him $200 in U. S. currency.
At this time he said, "Don't you think I would if I could?"
I said, "Well, why don't you put them in other people's names. I can always get somebody to cash them."
At this time he said, "You're only one person. You can only get one prescription blank."
At this time he finished that prescription blank.
He handed it to me.
He said, "Pay the doctor."
At this time I attempted to hand him fifteen dollars.
At this time he said, "No. It's twenty dollars."
He said, "Prices went up. Twenty dollars."
I then handed him a twenty dollar bill. I then left the pharmacy, returned back to the Narcotic Unit—I left the doctor's office, returned to the Narcotic Unit where I had xeroxed the prescription blank.
Later that day, I returned to the Luzerne Pharmacy at 8th and Luzerne and had the prescription blank filled."

N. T., Sept. 13, 1976,
pp. 97-102

There was again no examination of Officer Cassidy by Dr. Collier. Cassidy was with the defendant for a total of about five minutes. The prescription was for 30 Preludins, each of 75 milligram strength. (Exhibit C-7).

Dr. Sidney Schnoll testified as an expert medical witness for the Commonwealth. Dr. Schnoll is a licensed

physician with extensive qualifications in the areas of neurology and pharmacology. These qualifications include teaching experience at Jefferson and the University of Pennsylvania medical schools, authoring numerous articles, responsibility as Assistant Medical Director of Eagleville State Hospital and Director of the clinical facility there, and Medical Director of the Help Clinic in Philadelphia. Dr. Schnoll is also an appointed member of the Pennsylvania Drug, Device and Cosmetic Board, a statutorily created advisory board to the Secretary of Health, which has responsibilities, inter alia, in the areas of sale, manufacture and distribution of drugs.

Dr. Schnoll testified that Preludin is a brand name for phenmetrazine, that phenmetrazine is a general stimulant to the central nervous system, that in a 50 or 75 milligram dosage phenmetrazine has an addictive capability if taken for a sufficient duration of time, and that the recommended duration of a prescription is about twenty-one days. He further testified that prior to prescribing phenmetrazine, a physician should determine the condition of an individual's cardiovascular system by checking pulse, blood pressure and taking a medical history. With respect to glutethimide, Dr. Schnoll testified that it is a general depressant of the central nervous system, that it is usually intended for use once a day at bedtime, and that a physicial examination should be conducted prior to its prescription. In response to hypotheticals which assumed to be true those events testified to by Officer Cassidy, Dr. Schnoll stated his expert opinion to be that such prescriptions would not have been in good faith, would not have been given within a doctor-patient relationship, and would not have been in accordance with treatment principles accepted by a responsible segment of the Philadelphia medical community. When asked what the responsible medical community would do in such a case, Dr. Schnoll answered as follows:

> The recommended daily dose, especially with the 50, 75 dosage, is one per day.
>
> If the individual was taking the medication, as you have described in the hypothetical situation, they would be getting far in excess of one tablet per day of the medication, and that would be an excessive amount.
>
> It would be highly unrecommended to give that to any—to an individual. . . .
>
> [The responsible medical community] would question the individual as to why they were seeking this excessive amount of medication. They would probably not give an individual subsequent prescriptions for the medication on demand such as that and may attempt to get the individual into some sort of treatment situation if they are taking such excessive amounts of medication.
>
> N. T., Sept. 14, 1976, pp. 191-193

Dr. Collier testified in his own behalf as both a fact and an expert witness; his testimony to the effect that he provided the prescriptions in good faith, in the scope of a doctor-patient relationship and in accordance with accepted medical principles for the purpose of treating a weight problem, was found highly incredible. Likewise incredible was his testimony that Preludin is not a dangerous drug and is not habit forming. N. T., Sept. 14, 1976, p. 317.

In addition to his own testimony, Dr. Collier offered that of several reputation witnesses.

III. Conclusions of Law.

The statute which the defendant was prosecuted under prohibits:

> The administration, dispensing, delivery, gift, or prescription of any controlled substance by any practitioner or professional assistant under the practitioner's direction and supervision unless done (i) in good faith in the course of his professional practice; (ii) within the scope of the patient relationship; (iii) in accordance with treatment principles accepted by a responsible segment of the medical profession.
>
> 35 P. S. § 780-113(a)(14).

Thus, in the instant case, it was the burden of the Commonwealth to prove beyond a reasonable doubt each of the following elements: (1) dispensing or prescribing (2) of a controlled substance or substances (3) by a practitioner (4) not within a legitimate doctor-patient relationship as defined by the statute. *In Re Winship*, 397 U. S. 358 (1970); *Commonwealth v. Stoffan*, 228 Pa. Super. 127, 323 A. 2d 318 (1974).

The defendant concedes proof of the elements of (1) dispensing or prescribing, and the dispensing or prescribing (4) was not within a legitimate doctor-patient relationship, and challenges the Commonwealth's proof with respect to the remaining two elements.

A. Practitioner.

In pertinent part, the term "practitioner" is defined in the Act as

> . . . (i) a physician, osteopath, . . . or other person licensed, registered, or otherwise permitted to distribute, dispense, conduct research with respect to or administer a controlled substance, other drug or device in the course of professional practice or research in the Commonwealth of Pennsylvania[.]
>
> 35 P. S. § 780-102(b).

Pursuant to statute, 28 P. S. § 110, the Commonwealth was permitted to introduce at trial, over the objection of the defendant, a certified statement of medical licensure signed by the Pennsylvania Commissioner of Professional and Occupational Affairs.[1] The certification reads as follows:

> To whom it may concern:
>
> As of August 11, 1976, the records of the State Board of Osteopathic Examiners, Commission of Professional and Occupational Affairs, Department of State, Harrisburg, Pennsylvania, show that David I. Collier, D.O., was granted a license to practice osteopathic medicine and surgery in the Commonwealth of Pennsylvania on November 17, 1960.
>
> His current address on our files is 3961 N. 9th Street, Philadelphia, Pennsylvania, 19140, and he holds Certificate No. 051438.
>
> Dr. Collier is currently licensed and registered to practice osteopathic medicine and surgery in the Commonwealth of Pennsylvania.

The defendant contends that his demurrer to this evidence as proving the element in question, his status on the dates charged, was improperly overruled. He is, of course, correct that the certification does not so state that he was licensed on the dates charged—April 11, May 1, and May 13 of 1975. However, the Court notes that for purposes of ruling on a demurrer, all of the facts which the Commonwealth's evidence tends to prove, as well as all inferences reasonably deducible therefrom, are taken as true. *Commonwealth v. Long*, Pa. 354 A. 2d 569 (1976); *Common-*

1. The defendant did not renew his objection post-trial, thus the admission into evidence of the certification is no longer at issue. Commonwealth v. Bronaugh, Pa., 331 A. 2d 171 (1975).

wealth v. Mummert, 183 Pa. Super. 638, 133 A. 2d 301 (1957). The Court believes that the certification, received by the Commonwealth from the appropriate regulatory board, reasonably permits an inference that the defendant was licensed continuously throughout the referenced period, and that a fact finder could so infer beyond a reasonable doubt.

The viability of this as an issue, however, is now foreclosed to the defendant, for in the course of cross-examination he admitted that he was licensed to practice in Pennsylvania on the dates in question. N. T., September 14, 1976, pp. 303-304. The defendant can thus no longer challenge the sufficiency of the evidence on this point. See *Commonwealth v. Kohne,* 204 Pa. Super. 78, 203 A. 2d 401 (1964), *Commonwealth v. Spanos,* 167 Pa. Super. 629, 76 A. 2d 243 (1950).

B. Controlled Substances.

Glutethimide and phenmetrazine are among the substances which are listed on schedules of The Controlled Substance, Drug, Device and Cosmetic Act, 35 P. S. §§ 780-101 et seq. However, as correctly observed by defense counsel, glutethimide and phenmetrazine are not controlled substances per se. Glutethimide, which is listed in the first subdivision of Schedule III,[2] is a controlled substance only when the quantity involved is proved to have "a potential for abuse associated with a depressant effect on the central nervous system." *Commonwealth v. Teada,* Pa. Super., 344 A. 2d 682 (1975). Likewise, under the authority of *Teada,* phenmetrazine, which is listed in the third subdivision of Schedule II,[3] is a controlled substance only when the quantity involved is proved to have

2. 35 P. S. § 780-104(3)(i).

3. 35 P. S. § 780-104(2)(iii).

"a potential for abuse associated with [a] stimulant effect on the central nervous system."

Upon review of the trial record, the Court can find no testimony whatsoever regarding the quantity of glutethimide needed to present the requisite potential for abuse. Therefore, this drug is excluded from consideration for the date on which it was involved (May 1, 1975), or for any other date, in determining whether the Commonwealth's proof of "controlled substance" was sufficient.

As to the amount of phenmetrazine prescribed, however, the Court rejects the defendant's contention. For each of the dates involved, April 11, May 1, and May 13, the Court finds that the Commonwealth's proof of abuse potential of the quantities involved was indeed sufficient. As set forth in the Findings of Fact, *supra,* Dr. Schnoll's testimony was that phenmetrazine, when prescribed in 50 or 75 milligram doses and taken for a sufficient length of time, does have an addictive potential associated with a stimulant effect on the central nervous system. He also testified that the recommended duration of prescription is twenty-one days, and that its use as embodied in facts assumed by a hypothetical, which facts were ultimately found to exist by the Court, is excessive.

As also set forth in the Findings of Fact, the first prescription provided by the defendant, that of April 8, 1975, was for 30 Preludin (phenmetrazine) tablets of 50 milligram strength. (This prescription was given only 3 days after Officer Cassidy had been given a 14-day supply of phenmetrazine capsules). Despite the fact that by his own prescription the quantity should have lasted for *30 days,* the defendant but *20 days* later provided James Robertson with *another* prescription for 30 Preludin tablets (May 1, 1975). Moreover, this prescription was for an even higher dosage, 75 milligrams. And again, although the prescrip-

tion purported to be for one tablet per day, and should therefore have lasted for *30 days*, only *12 days* later the defendant provided a like prescription (May 13, 1975).

As fact-finder, the Court was properly entitled to consider this overwhelming evidence of mens rea, including awareness on the part of the defendant that the phenmetrazine tablets would not be taken merely at the rate of one per day as purportedly prescribed, but more likely were going to be consumed at many times that rate. The fact-finder could thus consider a substantial part of, or all of, the contents of each prescription as being subject to immediate consumption by James Robertson or his friend. In this light, the Commonwealth amply demonstrated, beyond a reasonable doubt, the presence of a prescription on each of the 1975 dates (April 11, May 1, and May 13) of a quantity of phenmetrazine sufficient to have "a potential for abuse associated with [a] stimulant effect on the central nervous system".

By THE COURT:

GOODHEART, *J.*